

314 CMR: DIVISION OF WATER POLLUTION CONTROL

314 CMR 9.00: 401 WATER QUALITY CERTIFICATION FOR DISCHARGE OF DREDGED OR FILL MATERIAL, DREDGING, AND DREDGED MATERIAL DISPOSAL IN WATERS OF THE UNITED STATES WITHIN THE COMMONWEALTH

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9.01: Authority, Jurisdiction, and Purpose

(1) Authority - 314 CMR 9.00 is adopted pursuant to Section 27 of the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 26 through 53 and establishes procedures and criteria for the administration of Section 401 of the federal Clean Water Act, 33 U.S.C. 1251 *et seq.*, for the discharge of dredged or fill material, dredging, and dredged material disposal in waters of the United States within the Commonwealth.

(2) Jurisdiction - 314 CMR 9.00 applies to the discharge of dredged or fill material, dredging, and dredged material disposal activities in waters of the United States within the Commonwealth which require federal licenses or permits and which are subject to state water quality certification under 33 U.S.C. 1251, *et seq.*. The federal agency issuing a permit initially determines the scope of geographic and activity jurisdiction. (*e.g.* the Corps of Engineers for Section 404 permits for the discharge of dredged or fill material)

(3) Purpose - 314 CMR 9.00 is promulgated by the Department to carry out its statutory obligations to certify that proposed discharges of dredged or fill material, dredging, and dredged material disposal in waters of the United States within the Commonwealth will comply with the Surface Water Quality Standards and other appropriate requirements of state law. 314 CMR 9.00 implements and supplements the Surface Water Quality Standards at 314 CMR 4.00 and is a requirement of state law under 33 U.S.C. 1251, *et seq.*.

9.02: Definitions

Activity - Any proposed project, scheme or plan of action which will result in a discharge of dredged or fill material or a discharge from dredging, or dredge material disposal subject to jurisdiction under 33 U.S.C. 1251, *et seq.*. In determining thresholds for and conducting evaluations of applications, the entirety of the activity, including likely future expansions, shall be considered and not separate phases or segments thereof. The activity includes temporary and permanent, direct and indirect, and cumulative impacts from the construction and ongoing operation of a project. The calculation of square footage shall include the total of the applicable areas proposed to be lost from the impacts of the activity, without reduction for replication or restoration.

Aggrieved Person - Any person who, because of a 401 Water Quality Certification determination by the Department, may suffer an injury in fact which is different either in kind or magnitude from that suffered by the general public and which is within the scope of interests identified in 314 CMR 9.00.

Applicant - A person proposing any activity which will result in a discharge of dredged or fill material, or a discharge from dredging or dredged material disposal in any water of the United States within the Commonwealth.

9.02: continued

Aquatic Ecosystem - Waters of the United States within the Commonwealth, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.

Area of Critical Environmental Concern - An area designated by the Secretary pursuant to M.G.L. c. 21A, § 2 (7) and 301 CMR 12.00.

Bordering Vegetated Wetlands - Any land or surface area so defined by the Massachusetts Wetlands Protection Act, M.G.L. c. 131, § 40 and 310 CMR 10.55(2).

Clean Water Act - The federal statute at 33 U.S.C. 1251 *et. seq.* which contains Sections 401 and 404.

Corps of Engineers - The United States Army Corps of Engineers, New England Division.

Department - The Massachusetts Department of Environmental Protection.

Discharge of dredged or fill material - Any addition of dredged or fill material into, including any redeposit of dredged material within, waters of the United States within the Commonwealth. The term includes, but is not limited to:

- (a) direct placement of fill, including any material used for the primary purpose of replacing with dry land or of changing the bottom elevation of a wetland or water body,
- (b) runoff from a contained land or water disposal area,
- (c) redeposit of dredged material including excavated material which is incidental to any activity including mechanized land clearing, ditching, channelization or other excavation, and
- (d) the placement of pilings when it has the effect of fill material.

Dredged material disposal - The transport, placement, or deposition of sediments or other material after dredging.

Dredging - The removal of sediment or other material from land under water below the mean high tide line for coastal waters and below ordinary high water for inland waters. Dredging shall not include activities in bordering or isolated vegetated wetlands.

Environmental Impact Report - The report described in the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61 through 62H and regulations at 301 CMR 11.00.

Environmental Monitor - The publication described in 301 CMR 11.19(1).

Final Order of Conditions - The Order of Conditions issued by the Commissioner of the Department after an adjudicatory hearing or, if no request for a hearing has been filed, the Superseding Order or, if no request for a Superseding Order has been filed, the Order of Conditions issued under the Wetlands Protection Act and 310 CMR 10.05.

High Energy Site - Locations in the open ocean where the average movement of the water in contact with the bottom exceeds 0.3 feet per second and which are suitable only for unconsolidated material.

Isolated Vegetated Wetlands - Vegetated areas subject to jurisdiction under 33 U.S.C. 1251, *et seq.* that are not bordering vegetated wetlands subject to jurisdiction under M.G.L. c. 131, § 40 and 310 CMR 10.55(2).

Land Under Water - The land or surface area defined in 310 CMR 10.25(2) and 310 CMR 10.56(2).

Lot - An area of land in one ownership, with definite boundaries.

Low Energy Site - Locations in the open ocean where the average movement of water in contact with the bottom is less than 0.06 feet per second.

Massachusetts Environmental Policy Act or MEPA - M.G.L. c. 30, §§ 61 through 62H and regulations at 301 CMR 11.00.

Notice of Intent - The document described in 310 CMR 10.05(4).

Outstanding Resource Water - A surface water of the Commonwealth so designated in the Massachusetts Surface Water Quality Standards at 314 CMR 4.00.

Person - Any agency or political subdivision of the Commonwealth or the federal government, public or private corporation or authority, individual, partnership or association, or other entity, including any officer of a public or private agency or organization.

Rare and Endangered Species Habitat - Areas identified as habitat for rare or endangered species by the Massachusetts Division of Fisheries and Wildlife's Natural Heritage Program as published in the Massachusetts Natural Heritage Atlas at the time an application is submitted.

Real Estate Subdivision - The division of a tract of land into two or more lots, including division where approval is required and where approval is not required under the Subdivision Control Law, M.G.L. c.41, §§ 81K through 81GG.

Salt Marsh - A coastal wetland as defined in M.G.L. c. 131, § 40 and 310 CMR 10.32(2).

Secretary - The Secretary of the Executive Office of Environmental Affairs.

Single and Complete Project - The total project proposed or accomplished by one or more persons, including any multiphased activity.

Sandy Sites - Locations in the ocean where the composition of a bottom sample contains no more than 20% (by weight) of particles less than 0.064 millimeters in diameter.

Silty Sites - Locations in the ocean where the composition of a bottom sample contains more than 21% (by weight) of particles less than 0.064 millimeters in diameter.

Surface Waters - All waters other than groundwaters within the jurisdiction of the Commonwealth, including, without limitation, rivers, streams, lakes, ponds, springs, impoundments, estuaries, wetlands, coastal waters, and vernal pools.

Vernal Pool - A waterbody that has been certified by the Massachusetts Division of Fisheries and Wildlife as a vernal pool. In the event of a conflict of opinion or the lack of a clear boundary delineation certified by the Division of Fisheries and Wildlife or the Department, the applicant may submit an opinion certified by a registered professional engineer, supported by engineering calculations, as to the boundary of the vernal pool. The maximum extent of the waterbody shall be based upon the total volume of runoff from the drainage area contributing to the vernal pool and shall be further based upon a design storm of two and six tenths (2.6) inches of precipitation in 24 hours.

Waters of the United States within the Commonwealth - Navigable or interstate waters and their tributaries, adjacent wetlands, and other waters or wetlands within the borders of the Commonwealth where the use, degradation, or destruction could affect interstate or foreign commerce as determined by the Corps of Engineers. Bordering and isolated vegetated wetlands and land under water are waters of the United States within the Commonwealth when they meet the federal jurisdictional requirements defined at 33 CFR 328 through 329.

Water-dependent - Uses and facilities which require direct access to, or location in, marine, tidal or inland waters and which therefore cannot be located away from those waters, including any uses and facilities defined as water-dependent in 310 CMR 9.00.

## 9.02: continued

401 Water Quality Certification or Certification - The document issued by the Department to the applicant and the appropriate federal agency under 33 U.S.C. 1251, *et seq.*, M.G.L. c. 21, § 27 and 314 CMR 9.00 certifying, conditioning, or denying an activity.

Wetlands Protection Act - M.G.L. c. 131, § 40 and regulations at 310 CMR 10.00.

9.03: Activities Not Requiring an Application

The activities identified in 314 CMR 9.03 (1) through (6) do not require an individual 401 Water Quality Certification application provided the specified conditions are met. The Department has certified these activities through its certification of the Corps of Engineers' Programmatic General Permit for Massachusetts effective March 1, 1995.

(1) Less than 5000 sq. ft. with an Order of Conditions. Activities conducted in compliance with the Wetlands Protection Act and receiving a Final Order of Conditions which meets all applicable performance standards under 310 CMR 10.00, provided that:

- (a) the Final Order of Conditions permits work which results in the loss of up to 5,000 square feet cumulatively of bordering and isolated vegetated wetlands and land under water. Both bordering and isolated vegetated wetlands must be delineated on the plans contained in the Notice of Intent and described on a form prescribed by the Department;
- (b) the Final Order of Conditions includes conditions requiring at least 1:1 replacement of bordering vegetated wetlands under 310 CMR 10.55(4)(b); and
- (c) the proposed work is not subject to 314 CMR 9.04.

(2) Beach Nourishment. Beach nourishment activities with a Final Order of Conditions issued under M.G.L. c. 131, § 40. The provisions of 314 CMR 9.04 do not apply.

(3) Dredging Less than 100 c.y. Dredging and dredged material disposal of less than 100 cubic yards, provided that a Final Order of Conditions has been issued and the proposed work is not subject to 314 CMR 9.04.

(4) Agriculture or Aquaculture Exempt under the Wetlands Protection Act. Normal maintenance and improvement of land in agricultural or aquacultural use exempt from the Wetlands Protection Act, as defined and performed in accordance with 310 CMR 10.04 (Agriculture) including the alternatives analysis, as applicable, performed by the Natural Resources Conservation Service (formerly Soil Conservation Service) or 310 CMR 10.04 (Aquaculture). The provisions of 314 CMR 9.04 do not apply.

(5) Less than 5000 sq. ft. of Isolated Vegetated Wetlands. Any activity in an area not subject to jurisdiction of the Wetlands Protection Act which is subject to 33 U.S.C. 1251, *et seq.* (*i.e.*, isolated vegetated wetlands) which will result in the loss of up to 5000 square feet cumulatively of bordering and isolated vegetated wetlands and land under water, provided there is no discharge of dredged or fill material to any habitat for rare and endangered species or to any Outstanding Resource Water.

(6) Planning and Design Activities. Activities that are temporary in nature, have negligible impacts, and are necessary for planning and design purposes such as the installation of monitoring wells, exploratory borings, sediment sampling, and surveying. The applicant shall notify the Department and conservation commission at least ten days prior to commencing the activity. Notification is not required if a Final Negative Determination of Applicability has been issued for the work as described 310 CMR 10.05(3)(b). Notification shall include a description of the activity, the location of the proposed activity and measures to be taken to avoid or minimize impacts. The site shall be substantially restored to its condition prior to the activity. The provisions of 314 CMR 9.04 do not apply.

## 9.03: continued

The Department will notify the persons to whom an Order of Conditions is issued not later than ten business days of its receipt by the Department that based on the information available to the Department the criteria of 314 CMR 9.03 have not been met. If the impacts to resource areas or the project size increases from the description filed with the Notice of Intent, or there are any inaccuracies therein, the applicant must notify the Department and request a determination that the criteria of 314 CMR 9.03 have been met before the activity begins.

9.04: Activities Requiring an Application

The activities identified in 314 CMR 9.04(1) through (11) require a 401 Water Quality Certification application and are subject to the Criteria for Evaluation of Applications for the Discharge of Dredged or Fill Material in 314 CMR 9.06:

- (1) More than 5000 sq. ft. Any activity in an area subject to 310 CMR 10.00 which is also subject to 33 U.S.C. 1251, *et seq.* and will result in the loss of more than 5000 square feet cumulatively of bordering and isolated vegetated wetlands and land under water.
- (2) Outstanding Resource Waters. Any activity resulting in any discharge of dredged or fill material to any Outstanding Resource Water.
- (3) Real Estate Subdivision - Any discharge of dredged or fill material associated with the creation of a real estate subdivision, unless there is a recorded deed restriction providing notice to subsequent purchasers limiting the amount of fill for the single and complete project to less than 5000 square feet cumulatively of bordering and isolated vegetated wetlands and land under water and the discharge is not to an Outstanding Resource Water. Real estate subdivisions include divisions where approval is required and where approval is not required under the Subdivision Control Law, M.G.L. c. 41, §§ 81K through 81GG. Discharges of dredged or fill material to create the real estate subdivision include but are not limited to the construction of roads, drainage, sidewalks, sewer systems, buildings, septic systems, wells, and accessory structures.
- (4) Activities Exempt under M.G.L. c. 131, § 40. Any activity not subject to M.G.L. c. 131, § 40 which is subject to 33 U.S.C. 1251, *et seq.* and will result in any discharge of dredged or fill material to bordering vegetated wetlands or land under water.
- (5) Routine Maintenance. Routine maintenance of existing channels, such as mosquito control projects or road drainage maintenance, that will result in the annual loss of more than 5000 square feet cumulatively of bordering and isolated vegetated wetland and land under water will be evaluated under the criteria of 314 CMR 9.06. A single application may be submitted and a single certification may be issued for repeated routine maintenance activities on an annual or multi-year basis not to exceed five years.
- (6) More than 5000 sq. ft. of Isolated Vegetated Wetlands. Any activity in an area not subject to jurisdiction of M.G.L. c. 131, § 40 which is subject to 33 U.S.C. 1251, *et seq.* (*i.e.*, isolated vegetated wetlands) which will result in the loss of more than 5000 square feet cumulatively of bordering and isolated vegetated wetlands and land under water.
- (7) Rare and Endangered Species Habitat in Isolated Vegetated Wetlands. Any activity resulting in the discharge of dredged or fill material to an isolated vegetated wetland that has been identified as habitat for rare and endangered species.
- (8) Salt Marsh. Any activity resulting in the discharge of dredged or fill material in any salt marsh.
- (9) Individual 404 Permit. Any activity subject to an individual Section 404 permit by the Corps of Engineers.

## 9.04: continued

(10) Agricultural Limited Project. Agricultural work, not exempt under M.G.L. c. 131, § 40, referenced in and performed in accordance with 310 CMR 10.53(5). Provided the activity does not result in any discharge of dredged or fill material to an Outstanding Resource Water, such work will be presumed to meet the criteria of 314 CMR 9.06 where a comparable alternatives analysis is performed by the Natural Resources Conservation Service (formerly Soil Conservation Service) and included in the Notice of Intent.

(11) Discretionary Authority. Any activity where the Department invokes discretionary authority to require an application based on cumulative effects of multiphased activities, cumulative effects from the discharge of dredged or fill material to bordering or isolated vegetated wetlands or land under water, or other impacts which may jeopardize water quality. The Department will issue a written notice of and statement of reasons for its determination to invoke this discretionary authority not later than ten business days after its receipt of an Order of Conditions.

(12) The activity in 314 CMR 9.04(12) requires a 401 Water Quality Certification application and is subject to the criteria for evaluation of applications for dredging and dredged material disposal at 314 CMR 9.07 and the requirements of 314 CMR 4.00:

Dredging Greater than 100 c.y. Any dredging or dredged material disposal of more than 100 cubic yards.

(13) Any activity not listed in 314 CMR 9.04 which is also not listed in 314 CMR 9.03 is an activity requiring an application subject to the requirements of 314 CMR 9.05 and 9.06 through 9.13 as applicable.

9.05: Submission of an Application

(1) Application Requirements. An applicant for 401 Water Quality Certification shall submit an application on the forms in the 401 Water Quality Certification application package currently available from the Department. The application shall be prepared in accordance with instructions contained in the Department's application package and submitted to the appropriate address. Failure to complete an application where required, to provide additional information when an application is deficient, to provide public notice in the form specified, to notify other agencies with jurisdiction where required, or to submit information for a single and complete project shall be grounds for denial of certification. The applicant has the burden of demonstrating that the criteria of 314 CMR 9.06, 9.07, or 9.08 have been met.

(2) Fee and Review Schedule. The fee and regulatory review schedule for actions by the Department in the review of a 401 Water Quality Certification application are set forth in the Timely Action Schedule and Fee Provisions at 310 CMR 4.00.

(3) Public Notice of an Application: A public notice of an application for 401 Water Quality Certification shall be published by the applicant within ten days of submitting an application at the applicant's expense in a newspaper of general circulation within the area of the proposed activity. The public notice shall contain:

- (a) the name and address of the applicant and property owner;
- (b) the location of the proposed activity;
- (c) a brief description of the activity;
- (d) the name and address of the person from whom additional information may be obtained;
- (e) the 21 day time period within which the public may comment;
- (f) the office and address within the Department to which comments should be addressed; and
- (g) a statement that any ten persons of the Commonwealth, any aggrieved person, or any governmental body or private organization with a mandate to protect the environment that has submitted written comments may also appeal the Department's Certification and that failure to submit comments before the end of the public comment period may result in the waiver of any right to an adjudicatory hearing.

## 9.05: continued

A person submitting an application for 401 Water Quality Certification who is also subject to 310 CMR 10.00 under M.G.L. c. 131, § 40, M.G.L. c. 91, or 310 CMR 9.00 may provide joint public notice by appending to the notice under 310 CMR 10.05(5) or 310 CMR 9.13 a statement that an application for 401 Water Quality Certification is pending before the Department, provided that the joint notice contains the information in 314 CMR 9.05(3)(a) through (g). A person submitting an application for the discharge of dredged or fill material to an Outstanding Resource Water shall also publish a notice in the Environmental Monitor, and the 21 day time period within which the public may comment shall extend from the later of the date of publication of the newspaper or Environmental Monitor notice. All comments providing relevant information shall be considered.

(4) The Department will conduct a site visit, providing notice to the applicant, the conservation commission of the city or town where the activity will occur, and any persons or groups which have submitted written comments prior to the date the site visit is scheduled. If the Department has previously inspected the site prior to issuing a Superseding Order of Conditions, receives no public comments, or otherwise determines a site visit is not necessary or useful to its evaluation, it shall set forth its reasons in writing.

9.06: Criteria for the Evaluation of Applications for Discharge of Dredged or Fill Material

(1) No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(a) An alternative is practicable if it is available and capable of being done after taking into consideration costs, existing technology, and logistics in light of overall project purposes.

(b) Where the activity associated with the discharge does not require access or proximity to or siting within wetlands and waters to fulfill its basic purpose (*i.e.*, is not "water dependent"), practicable alternatives that do not involve the discharge of dredged or fill material are presumed to be available, unless clearly demonstrated otherwise. In addition, all practicable alternatives to the proposed activity which do not involve a discharge are presumed to have less adverse impact on the aquatic ecosystem unless clearly demonstrated otherwise.

(c) The scope of alternatives to be considered shall be commensurate with the scale and purpose of the proposed activity, the impacts of the proposed activity, and the classification, designation and existing uses of the affected wetlands and waters in the Surface Water Quality Standards at 314 CMR 4.00.

1. For activities associated with access for one dwelling unit, the area under consideration for practicable alternatives will be limited to the lot. For activities associated with the creation of a real estate subdivision, the area under consideration will be limited to the subdivided lots and any adjacent lots the applicant formerly owned, presently owns, or can reasonably obtain an ownership interest.

2. For any activity resulting in the loss of more than one acre cumulatively of bordering and isolated vegetated wetlands and land under water, alternative sites not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed will be considered by the Department, but only if such information is required in an Environmental Impact Report or in an alternatives analysis conducted by the Corps of Engineers for an individual's 404 permit.

(2) No discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts to the bordering or isolated vegetated wetlands or land under water, including a minimum of 1:1 restoration or replication of bordering or isolated vegetated wetlands. Minimization and mitigation of adverse impacts shall be required for the selected alternative and the ability to minimize and mitigate impacts may be a factor in the evaluation of alternatives.

9.06: continued

(3) No discharge of dredged or fill material shall be permitted to Outstanding Resource Waters, except for the activities specified in 314 CMR 9.06(3)(a) through (i), which remain subject to an alternatives analysis and other requirements of 314 CMR 9.06:

- (a) Projects conducted or approved by public or private water suppliers in the performance of their responsibilities and duties to protect the quality of the water in the watersheds, or to maintain, operate and improve the waterworks system;
- (b) Activities determined by the Department to be for the express purpose and intent of maintaining or enhancing the resource for its designated use, after consultation with the entity, if any, with direct control of the water resource or governing water use;
- (c) Maintenance, repair, replacement or reconstruction but not substantial enlargement of existing and lawfully located structures or facilities including buildings, roads, railways, utilities and coastal engineering structures;
- (d) Where the designation was for public water supply purposes, activities subject to the comprehensive public water supply protection program enacted by the legislature for the Ware, Quabbin, and Wachusett watersheds in the Watershed Protection Act, St. 1992 c. 36 and M.G.L. c. 92:

1. Any activity for which an applicant has been granted a variance by the Metropolitan District Commission pursuant to 350 CMR 11.06(3) or for a discharge of dredged or fill material into a tributary that the Metropolitan District Commission has exempted pursuant to 350 CMR 11.06(4). A span or other bridging technique shall be considered an alternative in accordance with 314 CMR 9.06(3)(e) and the Department will consult with the Metropolitan District Commission in reviewing the alternatives; or

2. Any activity within an area of the Ware, Quabbin, and Wachusett watersheds not regulated by 350 CMR 11.00, as may be amended, provided that the applicant submits copies to the Department of a Request for Advisory Ruling from the Metropolitan District Commission pursuant to 350 CMR 11.06(1)(a)1. or a Request for Watershed Determination of Applicability pursuant to 350 CMR 11.06(2)(a)1. with the Metropolitan District Commission's Ruling or Determination that the property is not located within an area regulated by 350 CMR 11.00, as may be amended. Activities not within areas regulated by 350 CMR 11.00, as may be amended, do not require an individual 401 Water Quality Certification application if the provisions of 314 CMR 9.03(1)(a) and (b) apply. <sup>1</sup>

(e) Access for the construction of dwelling units and associated utilities:

1. For the loss of more than 5,000 square feet cumulatively of bordering and isolated vegetated wetland and land under water for access to any number of dwelling units, a span or other bridging technique is presumed to be practicable;
2. For the loss of less than 5,000 square feet cumulatively of bordering and isolated vegetated wetland and land under water for access to three or fewer dwelling units, a span or other bridging alternative is presumed to not be practicable;
3. For the loss of less than 5,000 square feet cumulatively of bordering and isolated vegetated wetland and land under water for access to four to nine dwelling units, a span or other bridging technique may be required within the alternatives analysis depending on site conditions, the impact on the resource, and cost considerations; or
4. For the loss of less than 5,000 square feet cumulatively of bordering and isolated vegetated wetland and land under water for access to ten or more dwelling units, a span or other bridging technique is presumed to be practicable.

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<sup>1</sup> The provisions of 314 CMR 9.06(3)(d)2. shall expire on March 1, 1997 if the Metropolitan District Commission has not adopted more accurate maps pursuant to 350 CMR 11.07(4) prior to March 1, 1997. Any use of maps to determine jurisdiction shall be limited to the location of streams. Maps may be used for informational purposes only for the general location of bordering vegetated wetlands. The provisions of 314 CMR 9.06(3)(d)2. shall apply only to the discharge of dredged or fill material and shall not apply to the discharge of stormwater, wastewater, or other liquid discharge.



## 9.06: continued

These presumptions may be overcome upon a showing of credible evidence that based on site considerations, impact on the resource, or cost considerations, a span or other bridging technique is or is not practicable.

(f) Construction of utilities, public or private roadways or other access except as specified in 314 CMR 9.06(3)(e), railroad track and rail beds and facilities directly related to their operation. These activities require use of a span or other bridging technique, unless the Department determines, based on information contained in a Department 401 alternatives analysis, a Corps of Engineers Section 404 alternatives analysis, or an Environmental Impact Report and the Secretary's certificate, that this alternative is not practicable, would not have less adverse impact on the aquatic ecosystem, or would have other significant adverse environmental consequences.

(g) Operations to clean up, prevent, assess, monitor, contain, or mitigate releases of hazardous materials or wastes, including landfill closures and activities undertaken in accordance with M.G.L. c. 21E and 310 CMR 40.0000.

(h) Projects which have received a variance under 314 CMR 9.08 or under 310 CMR 10.36 or 310 CMR 10.58 where consideration has been given to the Outstanding Resource Water designation in the variance analysis.

(i) Access to land in agricultural or aquacultural use, of a nature suitable to the use as defined in 310 CMR 10.04 (Agriculture;Aquaculture).

(4) Discharge of dredged or fill material to an Outstanding Resource Water specifically identified in 314 CMR 4.06(1)(d) (*e.g.*, vernal pools, within 400 feet of a water supply reservoir and any other areas so designated) is prohibited as provided therein unless a variance is obtained under 314 CMR 9.08.

(5) No discharge of dredged or fill material is permitted for the impoundment or detention of stormwater for purposes of controlling sedimentation or other pollutant attenuation. Discharge of dredged or fill material may be permitted to manage stormwater for flood control purposes only where there is no practicable alternative and provided that best management practices are implemented to prevent sedimentation or other pollution. No discharge of dredged or fill material is permitted for the impoundment or detention of stormwater in Outstanding Resource Waters for any purpose.

(6) Stormwater discharges shall be provided with best management practices to attenuate pollutants and to provide a set back from the receiving water or wetland. Stormwater discharges to Outstanding Resource Waters shall be removed or set back from the receiving water or wetland, and provided the highest and best practical method of treatment. All discharges of stormwater which meet the definition of "stormwater discharge", as defined at 314 CMR 3.04(2)(a)1. or (b), into Outstanding Resource Waters shall comply with 314 CMR 3.00 and 4.00.

(7) No discharge of dredged or fill material shall be permitted in the rare circumstances where the activity meets the criteria for evaluation but will result in substantial adverse impacts to the physical, chemical, or biological integrity of surface waters of the Commonwealth.

#### 9.07: Criteria for the Evaluation of Applications for Dredging and Dredged Material Disposal

(1) General - The criteria contained in this part are adopted as interim guidance for the evaluation of dredging and dredged material disposal projects in waters of the Commonwealth. In the opinion of the Department, these criteria represent the best information currently available for evaluation of such projects in Massachusetts waters. As additional information becomes available, these criteria will be modified to reflect the latest and best data and evaluation procedures.

The criteria contained in the following sections form the basis for the evaluation of dredging projects and shall be presumed to be appropriate unless other information is presented for a particular project. In the case of projects subject to the MEPA process, additional information may be generated relative to the expected impacts from the dredge spoil, the options available for disposal techniques, or alternative sites.

9.07: continued

(2) Classification of Dredge or Fill Material - On the basis of the application forms, the MEPA process, and any other information presented to the Department, the Department will classify the dredge or fill material into one of three categories and will impose such conditions on the project as may be necessary. The categories will generally be determined by the chemical constituents (see Table I) of the material, but the material will also be subdivided into one of three physical types (Table II).

(3) 

Table I

Classification of Dredge or Fill Material

By Chemical Constituents

All units are in parts per million

	<u>Category One</u>	<u>Category Two</u>	<u>Category Three</u>
Arsenic (As)	< 10	10 - 20	> 20
Cadmium (Cd)	< 5	5 - 10	> 10
Chromium (Cr)	<100	100 - 300	>300
Copper (Cu)	<200	200 - 400	>400
Lead (Pb)	<100	100 - 200	>200
Mercury (Hg)	< 0.5	0.5 - 1.5	> 1.5
Nickel (Ni)	< 50	50 - 100	>100
Polychlorinated			
Biphenyls (PCB)	< 0.5	0.5 - 1.0	> 1.0
Vanadium (V)	< 75	75 - 125	>125
Zinc (Zn)	<200	200 - 400	>400

Category One materials are those which contain no chemicals listed in Table I in concentrations exceeding those listed in the first column.

Category Two materials are those which contain any one or more of the chemicals listed in Table I in the concentration range shown in the second column.

Category Three materials are those materials which contain any chemical listed in Table I in a concentration greater than shown in the third column.

Other important man-induced chemicals or compounds not included in Table I which are known or suspected to be in the sediments at the dredge site will of course be given weight in the classification of the material and the choice of dredging and disposal methods. When the Department has reason to suspect the presence of any other toxins due to a nearby discharge, additional testing for that element may be required.

(4) 

Table II

Classification of Dredge or Fill Material

By Physical Characteristics

	<u>Type A</u>	<u>Type B</u>	<u>Type C</u>
Percent silt-clay	<60	60 - 90	>90
Percent water	<40	40 - 60	>60
Percent volatile			
solids (NED methods)	< 5	5 - 10	>10
Percent oil and greases			
(hexane extract)	< 0.5	0.5 - 1.0	> 1.0

Type A materials are those materials which contain no substances listed in Table II exceeding the amounts indicated in the first column.

Type B materials are those materials which contain any one or more of the substances listed in Table II in the concentration range shown in the second column.

9.07: continued

Type C materials are those materials which contain any substance listed in Table II in a concentration greater than shown in the third column.

When the Department has reason to suspect that biological contaminants are present (for example, because of the physical parameters) additional testing may be required.

(5) Dredging, Filling and Disposal Techniques - Table III identifies the normally approvable techniques for dredging or filling, the normally approvable methods of placing or disposal of the material and the normally approvable types of disposal sites. The table should be used in concert with 310 CMR 9.25 and 9.26.

Table III  
Normally Approvable Dredging, Handling and Disposal Options

CHEMICAL TYPE (TABLE I)	<u>Category One</u>			<u>Category two</u>			<u>Category three</u>		
PHYSICAL TYPE (TABLE II)	<u>A</u>	<u>B</u>	<u>C</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>A</u>	<u>B</u>	<u>C</u>
<u>Dredging Methods</u>									
Hydraulic	x	x	x	x	x	x	x	x	x
Mechanical	x	x	x	x	x	x	x	x	x
<u>Disposal Methods</u>									
Hydraulic: Sidecast	x	x	o	o	o	o	o	o	o
Hydraulic: Pipeline	x	x	x	x	x	x	x	x	x
Mechanical: Sidecast	x	x	o	o	o	o	o	o	o
Mechanical: Barge	x	x	x	x	x	x	x	x	x
<u>Placement</u>									
Land or in-harbor disposal with bulk-heading	x	(a)	(a)	(a)	(a)	(a)	(a)	(a)	(a)
Open ocean disposal at high energy, sandy sites	x	o	o	o	o	o	o	o	o
Open ocean disposal at low energy, salty sites	o	x	(b)	o	(b)	(b)	(b)	(b)	(b)
Unconfined in-harbor	x	o	o	o	o	o	o	o	o
Beach Replenishment	x	o	o	o	o	o	o	o	o
<u>Other Conditions</u>									
Timing and placement to Avoid Fisheries Impacts (spawning and running periods and areas)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)	(c)

- Legend
- x = Normally approvable

o = Not normally approvable

(a) = Normally approvable but control of effluent will be required

(b) = Approvable only after bioassay, performed in accordance with established EPA procedures, indicates no significant biological impact. A statistically comparable project which has successfully passed the bioassay test may be substituted. If a significant biological impact is found, this material is unsuitable for open water disposal.

(c) = Required in all cases.

9.08: Variance

The Commissioner may issue a variance of the criteria for evaluation of applications under 314 CMR 9.06 or 9.07 if the applicant demonstrates that:

- (1) All reasonable measures have been proposed to avoid, minimize, and mitigate adverse effects on the environment; and
- (2) The variance is justified by an overriding public interest or necessary to avoid a certification that so restricts the use of property as to constitute an unconstitutional taking without compensation.

The applicant may file an application for a variance with the Commissioner of the Department stating the proposed measures to avoid, minimize, and mitigate adverse effects and evidence of an overriding public interest or unconstitutional taking. If after public notice the Commissioner finds that the activity meets the variance criteria, the Commissioner shall specify which regulation(s) has been waived and what conditions must be met for certification. The Commissioner may consolidate variance decisions under 314 CMR 9.00, 310 CMR 10.36 and 10.58, and 310 CMR 9.21. Publication of the variance application in the Environmental Monitor shall constitute notice to the public and to agencies with acquisition authority of the Department's pending determination.

9.09: 401 Water Quality Certification

The Department will certify in writing to the appropriate federal agency and to the applicant whether or not the proposed project will meet applicable water quality standards and minimize environmental impacts through compliance with 314 CMR 4.00 as implemented and supplemented by 314 CMR 9.00. Certification will be denied if the criteria of 314 CMR 9.06, 9.07, or 9.08 as applicable are not met. The Department shall send copies of the 401 Water Quality Certification or denial concurrently to the conservation commission, any person who submits written comments during the public comment period and any others who submit a written request. The certification or denial will contain:

- (1) the name and address of the applicant, the address of the proposed activity, and the date of the Department's determination;
- (2) the federal permit number, the 401 Water Quality Certification Transmittal Number and the Wetlands Protection Act File Number, if applicable and available;
- (3) a statement that there is or is not reasonable assurance that the activity will be conducted in a manner which will not violate applicable Surface Water Quality Standards at 314 CMR 4.00 as implemented by 314 CMR 9.00 and a statement of reasons if certification is denied;
- (4) any conditions deemed necessary by the Department to insure maintenance or attainment of water quality, minimization of any damage to the environment which may result from the project, or compliance with any applicable provisions of Massachusetts law which the Department is authorized to administer. As a condition of certification of subdivisions or other phased activities, applicants may be required to record a deed restriction which would limit subsequent discharges of dredged or fill material to ensure that the criteria for the evaluation of applications have been applied to a single and complete project, including all components of multi-phased activities;
- (5) the date the work may begin. No activity may begin prior to the expiration of the appeal period or until a final decision is issued by the Department if an appeal is filed;
- (6) a statement that the certification does not relieve the applicant of the duty to comply with any other statutes or regulations; and
- (7) notification of the right to request an adjudicatory hearing as described in 314 CMR 9.10.

9.10: Appeals

(1) Right to Appeal. Certain persons shall have a right to request an adjudicatory hearing concerning certifications by the Department when an application is required:

- (a) the applicant or property owner;
- (b) any person aggrieved by the decision who has submitted written comments during the public comment period;
- (c) any ten persons of the Commonwealth pursuant to M.G.L. c. 30A where a group member has submitted written comments during the public comment period;
- (d) any governmental body or private organization with a mandate to protect the environment which has submitted written comments during the public comment period.

Any person aggrieved, any ten persons of the Commonwealth, or a governmental body or private organization with a mandate to protect the environment may appeal without having submitted written comments during the public comment period only when the claim is based on new substantive issues arising from material changes to the scope or impact of the activity and not apparent at the time of public notice.

(2) Notice of Claim. Any notice of claim for an adjudicatory hearing must be accompanied by a filing fee as specified in 310 CMR 4.06 and be sent by certified mail or hand delivered to the Office of Administrative Appeals of the Department of Environmental Protection, postmarked within 21 days of the date of the certification.

(3) Contents of Claim. Any notice of claim for an adjudicatory hearing must include the following information:

- (a) the 401 Certification Transmittal Number and Wetlands Protection Act Number, the name of the applicant and address of the project;
- (b) the complete name, address, and telephone number of the party filing the request; the name, address and telephone number of any authorized representative; and, if claiming to be a person aggrieved, the specific facts that demonstrate that the party satisfies the definition of "aggrieved person" found in 314 CMR 9.02;
- (c) a clear statement that an adjudicatory hearing is being requested;
- (d) a clear and concise statement of facts which are grounds for the proceeding, the specific objections to the Department's written certification, and the relief sought through the adjudicatory hearing, including specifically the changes desired in the final written certification; and
- (e) a statement that a copy of the request has been sent by certified mail or hand delivered to:
  - 1. the applicant;
  - 2. for projects in Outstanding Resource Waters, the public or private water supplier where the project is located, the Department of Environmental Management for projects in Areas of Critical Environmental Concern, or other entity with responsibility for the resource;
  - 3. the owner, if different from the applicant;
  - 4. the appropriate regional office of the Department;
  - 5. the conservation commission of the city or town where the activity will occur.

(4) Coordination of Appeals. The Department may coordinate adjudicatory appeals under 314 CMR 9.00, 310 CMR 10.00, 310 CMR 9.00 or other administrative appeals:

- (a) If a final order has been issued pursuant to 310 CMR 10.00, the Department may exclude issues within the jurisdiction of 310 CMR 10.00 at an adjudicatory hearing held under 314 CMR 9.00.
- (b) If an adjudicatory hearing has been requested under 314 CMR 9.00, 310 CMR 9.00, 310 CMR 10.00, or another administrative appeal, the Department may consolidate the proceedings.

9.11: Enforcement

Failure to comply with 314 CMR 9.00 or a 401 Water Quality Certification shall be enforced as provided in M.G.L. c. 21, §§ 42 and 44, M.G.L. c. 21, §16A and 310 CMR 5.00.

9.12: Authorization of Emergency Action

In the rare situation where immediate action is essential to avoid or eliminate a serious and immediate threat to the public health or safety or to the environment, a person may act without a certification, provided that the person obtains prior approval of the Department or authorization under M.G.L. c. 131, § 40. The Corps of Engineers' emergency provisions for Section 404 permits are located at 33 CFR 325.2(e)(4).

(1) Any activity subject to the jurisdiction of 310 CMR 10.00 which has been certified as an emergency by a conservation commission conducted in accordance with 310 CMR 10.06, or by the Department under 310 CMR 10.06(5), and any oil or hazardous material "Immediate Response Action" undertaken in accordance with the provisions of 310 CMR 10.06(7), is also authorized under 314 CMR 9.00.

(2) Absent authorization under 310 CMR 10.00, a written request shall be submitted to the Department which describes the location, the work to be performed, and why the project is necessary for the protection of the environment or the health or safety of the public. Emergency approval shall be issued in writing and shall specify the limits of activities necessary to abate the emergency. When the necessity for undertaking the emergency action no longer exists, any emergency action shall cease until compliance with the provisions of 314 CMR 9.00. In any event, the time limit for performance of emergency work shall not exceed 30 days, unless a written extension is approved by the Department. The emergency authorization may require the submission of an application. No work may be undertaken without emergency authorization under M.G.L. c. 131, § 40, M.G.L. c. 91, and M.G.L. c.30, §§ 61 through 62H, where applicable.

(3) Any activity subject to the jurisdiction of 310 CMR 9.00 which is eligible for authorization by the Department under 310 CMR 9.20 may receive emergency authorization under 314 CMR 9.12, provided that the applicant submits sediment data or other information if requested by the Department.

(4) "Immediate Response Actions" not subject to the jurisdiction of 310 CMR 10.00, which receive oral approval from the Department pursuant to 310 CMR 40.0420(2), or are initiated 24 hours prior to notification and oral approval pursuant to 310 CMR 40.0420(7) and (8), may commence before a written request under 314 CMR 9.12(2) is submitted to the Department, provided the request is made within 24 hours after the Department's oral approval. Once a request for emergency certification has been made pursuant to 314 CMR 9.12(2), work that commenced prior to such filing may continue pending a decision on the request by the Department.

9.13: Effective Date, Transition Rule, and Severability

(1) Effective Date. The revisions to 314 CMR 9.00 shall take effect March 1, 1995. Any application submitted to the Department prior to March 1, 1995 shall be considered under the standards and criteria in effect prior to adopting these revisions.

(2) Transition Rule. When an applicant has filed a Notice of Intent under M.G.L. c. 131, § 40 prior to March 1, 1995 for which a Final Order is subsequently issued and the planning board approves a definitive subdivision plan pursuant to M.G.L. c. 41, §§ 81K through 81GG or determines that approval is not required based on plans that substantially conform to the Notice of Intent, activities related to a real estate subdivision shall be subject to the substantive standards as previously in effect under 314 CMR 9.00 dated December 31, 1983. Such activities shall be subject to the application provisions of the revised 314 CMR 9.00 effective March 1, 1995, but not including 314 CMR 9.06 through 9.10.

(3) Severability. If any provision of any part of 314 CMR 9.00, or the application thereof, is held to be invalid, such invalidity shall not affect any other provision of 314 CMR 9.00.

## REGULATORY AUTHORITY

314 CMR 9.00: M.G.L. c. 21, §§ 26 through 53.